

TABLE OF AUTHORITIES CITED

Cases

	Page
American Stainless Steel Co., v. Ludlum Steel Co. 294 Fed. 103	47
Cantrell et al., v. Wallick, 117 U. S. 689.....	49
Carnegie Steel Co., v. Cambria, 185 U. S. 403.....	48
Diamond Rubber Co., v. Consolidated Tire Co., 220 U. S. 428	48
Ives v. Hamilton, 92 U. S. 426.....	48
Kurtz v. Bell Hat Lining Co., 280 Fed. 277.....	48
Loom Co., v. Higgins, 105 U. S. 580.....	46
Minerals Separation, Ltd., v. Hyde, 242 U. S. 261.....	47
Mowry v. Whitney, 14 Wall 620.....	48

Statutes

Judicial Code Sec. 274d, title 28 U. S. C. A. s. 400	6
Act of June 19, 1934, s.651 #1.....	36

Exhibits

Ballou patent in printed transcript (44 to 47).....	12
Decision of Board of Appeals, in printed trans- cript (52 to 53).....	12, 13
Goodsell-Maynard in printed transcript (138 to 139)	14-16
Walsh-Caprio, in printed transcript (154 to 156)	4, 5, 13

SUBJECT INDEX

	Page
Petition	1
Opinions	2 to 5
Jurisdiction	5
Short Statement of Case	6
Mandate, Examine Writ for Approval.....	8
Mistakes between Courts	8 to 11
Questions Presented	11
Reasons for Granting Writ.....	12
Bank-teller can not accept.....	14
District Court Blames Defendant.....	17
Cutting-off of Testimony	19 to 20
Rackets	22
Invention p. 15; X, p. ²⁴ / ₂ and more about it.....	28, 29, 30
Difficulties	31, 32
Unduly Long Case 19-8/12; p. 20 ; p. 21; p.33; p. 40	24
Supreme Court of the United States.....	31, 32
Prayer (Oath 38)	37
Brief—Opinions and Judgments	39
Invention and Cases Supporting It.....	41
(a) Distinction, (b) left out compounded (1) (2)	41
(c) not in prior art, preposterous	42
(d) Ballou alone has it, and law applied.....	46
(d-1) known elements, (d-2) skilled man.....	46
(d-3) broad, variation; (d-4) mistaken.....	47
(d-5) combination; (d-6) evidence of invention	49
Jurisdiction	52
Conclusion	53

IN THE
Supreme Court
OF THE
United States

OTTO H. KRUGER,

Petitioner,

vs.

NED WHITEHEAD, doing business
under the fictitious name of WHITE-
HEAD & CO.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO RE-
VIEW THE JUDGMENTS OF THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT (11008), AND OF THE
UNITED STATES DISTRICT COURT, SOUTH-
ERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION (3116-BH).**

To the Honorable, the Chief Justice, and the Asso-
ciate Justices of the Supreme Court of the United
States:

Your petitioner, Otto H. Kruger, prays that a writ
of certiorari issue to review the judgments of the
United States Circuit Court of Appeals for the Ninth
Circuit (11008), and of the United States District
Court, Southern District of California, Central Divi-

sion (3116-BH), as contained in Court-Statements, delayed-Opinion, and mistaken Appeal-Opinion, to wit: (a₁)—*Trial - Court Trial-Day - Finale* — “Distr.-Ct.: While the patent has been referred to as a simple patent, yet it indicates that there has been an improvement here of technique in the making of identification cards which have some features that are quite unique” ((in printed transcript (133-1/4)). (see also page 6 here under date Oct 16 1944) ;—

(a₂)—“*Distr.-Ct.*: Gentlemen, I am going to require briefs in this case, so that I will have them before me. I am willing to have any discussion of that subject matter that counsel desires to offer.” (132-4/7;—

(a₃)—“*Distr.-Ct.*: It is just argument, that is all, a form of witness’ testimony” (132-16/17) ;—

(a₄)—*Memorandum-Opinion* of same court (20-21 transcript)

(b)—*Opinion of Circuit Court of Appeals for Ninth Circuit*, recopied from one received from the then-counsel—

“Before: Stephens, Orr and Wilbur, Circuit Court Judges.—Wilbur, Circuit Judge:

“This is a proceeding for a declaratory judgment brought by the manufacturer of an identification card which the defendant claims to be an infringement of his patent No.—2,088,567, applied for October 22, 1934, and issued to him August 3, 1937, as assignee of the inventor, John Mck. Ballou. The defendant counter-claimed for infringement. The claims of the patent

were based upon the printing of the identifying card with an ink that would be dissolved by any solvent which would dissolve the celluloid, or similar material in which the card was encased, thus disclosing that the card had been tampered with. The enclosing of a card with printed matter thereon in such transparent material was not, and is not, claimed to be novel. It is shown in patent No. 1,071,226, issued to Goodsell and Maynard August 26, 1913. It is in the choice of ink that the patentee claims the invention lies. The evidence shows that there was no other kind of ink in existence. That is, every known ink would be so affected by any chemical capable of dissolving the transparent envelope containing the card adhering thereto. The trial court, in a terse opinion, held that there was no invention and that if there were it was not disclosed as required by law. The findings of fact followed the opinion and the court decreed claims 1, 2, 4 and 5 of the patent to be void and enjoined the patentee from representing to the trade that the identification card manufactured by the plaintiff infringed such patent.

The defendant appeals. He claims that "the court overlooked a vital distinction. Substantially 'affecting' an ink does not fulfill the requirement of the patent nor the language of the claims. The identifying inked matter must be distorted. (The patent claims specify 'dissolvable'.) Even if all inks are 'affected' by a given solvent, only some of them will reveal distortion by bleeding."

The patentee does not name in his patent specifica-

tions or claims the ink which is to be used in the patented card, nor describe it otherwise than by its one characteristic which is that it will be dissolved by any solvent that will dissolve the card's container.

Further description he claims is unnecessary for, as he correctly states, such solvents are well known to those trained in the art. Wherein, then, lies the invention? The election of known materials is not itself an invention.¹ The patent does not inform persons familiar with the art how to utilize the patent. They are left to make their own selection of material and their own experiments to practice the invention. Complete disclosure is the price paid for the patent's temporary monopoly. The truth is that all the patentee had was an idea that the use of a solvent ink on an identification card would tend to prevent counterfeiting. Mere ideas are not patentable; it is the means for carrying the idea out that is patentable.²

The patent to Walsh and Caprio, No. 2,079,641, describes a process and a manufacture identical with that of the patent in suit. The difference is that Walsh and Caprio, knowing that practically all inks are soluble and bleed when treated with a solvent that will affect the transparent cover of a card containing printed matter, sought to overcome the bleeding which might result during the process of manufacture by inserting a cement between the printing on the card and the

¹Sinclair & Carroll Co., Inc. v. Interchemical Corp., 325 U. S. 327.

²Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. 2d. 263, 275.

transparent envelope. It is clear that if the card or product manufactured by the process described in the Walsh and Caprio patent were submitted to a solvent which would dissolve the transparent envelope containing the card the printed matter on the card would dissolve or bleed, and thus meet the claims of the patent in suit. To use the patent combination or device of Walsh and Caprio for a new purpose does not amount to invention.³ The findings of fact (Nos. 2 and 11) that there is no invention in defendant's patent must be sustained.

The patent in suit does not disclose or describe the invention as required by Rev. Stat. 4888; id. 35 U.S.C. #33, and for that reason also is void.

Decree affirmed.

(Endorsed:) Opinion. Filed Feb. 6, 1946. Paul P. O'Brien, Clerk."

JURISDICTION

The jurisdiction of this Court is invoked under information from the Office of the Clerk Supreme Court of the United States that a petition for a writ of certiorari may be filed to review the judgment of the Circuit Court of Appeals provided it reaches the Office within three months from the date of that judgment.

³(see *Ferdinand DeSt. Germain v. Emanuel Brunswick*, 135 U. S. 227); *Grand Rapids Show Case Co. v. Weber Show Case Co.*, 38 F. 2d, 730, CCA9; *Farmers Co-op. Exch. v. Turnbow*, 111 F. 2d 728, CCA 9.

The *effective* date of the judgment and decree could not very well be before having final notice that no further action can be had, since petition for review had been (C.C.A. 9)—acknowledged and held in abeyance so as to lead petitioner to believe to have to expect a review in due time; and since a petition to the Supreme Court could not very well be made while a petition was still before the lower Court. ((—(—) mine)) (only for emphasis) (pp. 7-11—

SHORT STATEMENT OF THE CASE

An action under the Declaratory Relief Act (Judicial Code, Section 274d, Title 28 U. S. C. A. Section 400) was brought against the petitioner on August 27, 1943 by the plaintiff-appellee-respondent Ned Whitehead, doing business under the fictitious name of Whitehead & Company.

On April 21, 1944, the defendant-appellant-petitioner Otto H. Kruger duly served and filed an answer and counter-claim under his patent 2,088,567.

On September 7, 1944, a trial was had before the Honorable Ben Harrison, Judge of the District Court.

On October 16, 1944, five or more weeks after trial and *Court-Statement in favor of Kruger*; the District-Court rendered a *Memorandum Opinion against Kruger*.

On November 15, 1944, final judgment in favor of Whitehead was rendered.

On February 9, 1945, notice of Appeal was filed with the Circuit Court of Appeals Ninth Circuit.

On February 6, 1946, the C.C.A. 9 rendered an opinion of which a copy is indicated in pages 2, 3, 4 and 5 hereinbefore; a printed copy of this having been forwarded to Kruger about February 14, 1946 by the then counsel of Kruger.

On March 1st 1946, this counsel gave written notice of withdrawing from the case, leaving Kruger deserted at the most inopportune moment. So far, each and every counsel introduced had only made the case so much more confused, Kruger having had great difficulties of getting any counsel and the counsel's action in Court during the trial is well-enough self-explanatory as to what Kruger was able to retain. Kruger could *not possibly get other counsel* to expect any better showing for reasons to be set forth hereafter;* and, by submitting this point of view, Kruger was allowed to submit his case personally in typewritten form as a consequence; Kruger having been denuded of all means even having had to sell his much-needed car, paying this last counsel \$1700.00, though, perhaps, more was wanted and needed, to make proper efforts. (*pp. 31, 32, 33 here)

This last counsel's letter, but more clearly verbally when Kruger called at his office; emphasizing that I had no recourse what-so-ever with the U. S. Supreme

Court, clearly contrary to Official information just received; or I would otherwise have submitted this petition at that very time.

On March 6, 1946 a petition for rehearing was filed instead, with the Circuit Court of Appeals.

On April 16, 1946 the petition was denied.

On April 23, 1946 C.C.A. 9 sent notice of a mandate having been filed with, and being held by, the District-Court, the notice reading—

“For your information in the matter, I beg to advise that the mandate of this Court under Rule 28 in above cause was this day issued and forwarded to the Clerk of the Court below.

“Please *examine* the writ forthwith, and if the same does not meet with the *approval* of the court, yourself and counsel opposed, the same should be *promptly returned* to my office with advices and appropriate suggestions, (sign. etc., Clerk C. C. A. 9)

On May 2, 1946 an “objection” was filed with both Courts, acknowledged by C. C. A. 9 of May 4, 1946.

Complying with the notice to “examine the writ”, on calling at the Distr.-Ct.-Clerk’s office, not getting any desired information, and not hearing anything; Kruger inquired by mail under date of June 20, 1946, to which came—

“June 18, 1946 Deputy-Clerk Distr.-Ct.—In answer to your letter of June 17, 1946, with regard to procedure to get above matter on the calendar,

please be advised that the records in my office show that the *mandate was recalled to the Circuit Court of Appeals and leave granted appellant to file for rehearing in typewritten form.* Therefore, it appears that you should inquire of the clerk of the higher court as to the procedure in this instance —”

This letter and the following should not be looked at in the light of criticisms or accusations but only as an effort to beg for an understanding on timely delays, though also showing the leave for typewritten form.

“June 19, 1946 clerk of C. C. A. 9—addressed to clerk of Distr.-Ct.—I acknowledge receipt of copy of your letter dated June 18, 1946 to Mr. Kruger, and to advise that the mandate of our Court was reissued on April 23rd, and is no doubt in your files.”

June 20, 1946 Kruger filed promptly with C.C.A. 9 copies of “Question on Delays”, which had been submitted to Distr.-Ct.—under date of June 10, 1946, and of which copies had also been submitted to opposition, receiving—

“June 21, 1946 clerk of C. C. A. 9—

I acknowledge receipt of your letter dated the 20th instant, enclosing original and three typed copies of “Petition for Reconsideration”.

“The petition for rehearing filed by you on March 14th was denied by the court on April 16th and the mandate of our court reissued to the Distr.-Ct. on April 23rd.

"If, in view of the above you desire me to pass your documents to the Court, I shall do so.

Please advise me." (emphasis mine)

not possibly to be taken by me of any sort of closing the case so far.

"June 21, 1946 Clerk Distr-Ct.—In answer to your letter of June 17, and supplementing my letter of June 12, I wish to advise that the mandate in the above case has been received from the Circuit Court of Appeals, and is being held by me pending its being spread upon the minutes of this court.—"

Accordingly, a motion for review was filed promptly, but, at the hearing, Distr.-Ct.—insisted not having any authorities, etc., but gave a week for me to produce a better showing. (Ct.—going on vacation before date)

August 20, 1946, distr.-Ct.—denied review, under "*examine*"- mandate from C. C. A. 9, *ignoring cases*.

..... August 20, 1946, distr.-Ct.—denied review, un- mistakes was then promptly filed with C. C. A. 9, and thus acknowledged August 27, 1946.

However, nothing further having been received, a status letter was submitted as to getting review on October 15; and another inquiry on October 28th, to which came—

"C. C. A. 9 October 30, 1946: I have your favor dated the 28th instant, enclosing original and copies of "On the Petition for a Review of August 24, 1946"

Again, months passed without any action, though no denial, or closing of case; causing me to ask again on status of case, receiving—

“May 12, 1947, Clerk C. C. A. 9: I have your favor dated the 9th instant, which I have read with interest, and beg to advise that your CASE, as far as our Court is concerned, IS CLOSED.”
(emphasis mine)

QUESTIONS PRESENTED

1. Should “Justice” not have at least a part in Court actions and in Judgments? (besides observance of law)?

2. Considering all circumstances, could it possibly be held that “Justice” had any part in this case?

3. How can a patent be deemed to be adjudged if there was no judgment on the gist of the invention?

4. With all this in view, is there really any judgment in this case?

5. Did the layman-petitioner really delay actions in any real sense of the word, considering all the above questions? (and the mistakes between Courts-) (8-11).

6. If it be found that opposition caused most of the confusions, and even the Courts were not entirely free of giving undue difficulties to petitioner; should a certiorari not be justified now?

7. Considering the real facts and real evidence in this case, should both of the previous judgments not be reversed?

8. Should the Ballou patent not be deemed to be valid and to have been deliberately infringed with full knowledge of the respondent?

9. Should the petitioner not be entitled to a proper reimbursement of his expenses in this case; together with an accounting from the respondent, and an injunction against the respondent?

REASONS FOR GRANTING THE WRIT

In the Opinion of C. C. A. 9, as copied on page 4 herein-before, line 6—

“correctly states, such *solvents are well known*” (referring to Kruger’s contention).

The Ballou patent application had been given special attention, to get it beyond the Primary Examiner, to the Board of Appeals, getting a Decision—

“*references show the solubility of the ink*” (53-22/23 of printed transcript)

“adoption of this idea in Goodsell-Maynard would have no object at all” (53-24/26).

The Appeal-Board Decision was purposely made the principal exhibit by Kruger, to show a known fact in prior art.

Testimony during trial called attention to it—

“Distr.-Ct.: *Solvents* that would affect ink—
more or less common knowledge”. (102-11/13).

Notwithstanding, the Court asserted unwarrantly
by its own assumption, practically *presumption*, con-
trarily—

“Distr.-Ct.: *gist* of the patent is the *discovery*
of a solvent” (20-12/13);
on which the Court unduly, not to say worse things,
concluded—

“As a matter of fact I feel no discovery was
made” (21-19/20). (*NOT ON SOLVENT! NO!!*)

Of course not! Kruger said so in Depositions, long
before trial, to Lyons; and ever since, in Court repeat-
edly;—but *C. C. A. 9* holds:

“decree affirmed”. (*How could that be*, when *C.*
C. A. 9 said “*well-known*”, but Distr.-Ct.—“*Sol-*
vent gist of invention”, showing *extreme diversity*
of OPINION??). (p. 12, *C. C. A. 9*).

Furthermore, *Distr.-Ct.*—also said:—

“I want to say frankly that I am not impressed
much by the prior art” (135-3/4);—
but the *C. C. A. 9* said:

“*manufacture identical* with that of the patent in
suit” (lines 20/21 of page 4 herein-before).

Is that, too, *affirming decree* of Dist.-Ct.—having
expressed and held against prior art?

Though comparing our patent 2,088,567 with the
Walsh-Caprio-patent; “*identical*” really refers to a

*mere picture, with which even a Judge would hardly be willing to embarrass himself before a Bank-teller, who might agree that the picture is pretty, perhaps not laughing the Judge in the face but, politely asking whether the Judge had not *other* identifications on him, and that notwithstanding that the Judge might have typed his name on such picture, in the manner indicated in the Goodsell-Maynard patent, on which the Patent-Office Board of Appeals ruled quite intelligently as on page 12, here under (53-22/23 and (53-24/26.)*

In fact, there is no personal identification in either, Goodsell-Maynard nor Walsh-Caprio (1,071,226 and 2,079,641); and there is nothing to co-act within any sort of identification-matter with any sort of a vouched-identity of the bearer of a card, such as in the Ballou-patent. Walsh-Cement prevents bleeding.

The Lyons know, and knew, this all too well. They had cited several checks, but dropped them like hot potatoes, two (142 and 146) being still in printed transcript but without supporting-testimony or anything for explanation, the Lyons well enough aware, that Kruger's answers should have made it clear enough to anybody, and Lyons only hoping that Courts will not stumble on to the facts, that, no matter if a bearers' name is on a check, and/or all the so-called safety-paper, and/or the fanciest coloring is used,—it still does not make a check any sort of identification.

The Bank-teller will still want your identification.

The Ballou patent makes it quite clear that direct co-action is the paramount essential, as set forth in lines 36 to 41, first page of the patent, (45 of transcript), the personal designation, indication, representation, presentation, or what-have-you,—called—

“original and distinctive with or by the holder”;—is not *all*, or the *only* thing; but—

“*furthermore*” line 43;

something—

“to be quickly and readily recognized as *such*”
(lines 43-44);—

as such *as*—

“reliable identification” (line 42);—

and the designation of the holder must be in direct co-action with some *such* “readily recognized”—*vouch*.

The patent is very elaborate from there on, and is really saturated with any and all sorts of information any man skilled in the art could possible ask for, and, particularly, such as recited as suggestive in part, in lines 18 to 26 in the second column of the patent.

But, all these things *must, and will, co-act*, if arranged as in lines 29 to 37 on page 2 of the patent, (46 of the transcript).

Then, indeed, all this will assure the result as set forth in lines 63 to 73. (46)

It is hard to believe that so much elaborate detailing should not have been enough for such old practitioners, as the Lyons; but we may be sure that they comprehended; otherwise, they would not have dropped things

just like hot potatoes whenever answers came near enough to knock out their pet references. They did not dare to bring any expert, as he would have had to admit the fallacy of their pretence. Their's is a pretending game, more to come.

Came, however, *Lyons* to read us some phrase out of the Goodsell-Maynard-patent, to say that—

“the interposed identification device, as it has been termed, may bear printing on both sides.

“For instance, in the case of a horticultural (y) *label, on one face* of the identifying device could be printed the *name* of a flower or something of a similar character or even a symbol; while the (z) *opposite face* might bear *advertising matter* of a florist or nurseryman.”

((y) and (z) and emphasis being mine))

Nevertheless, the *Lyons* seem to pretend to overlook that this is nothing more than what has been illustrated in the drawing of that patent;—

(y)—one face showing *one thing only*, and—

(z)—the opposite face, too, showing *one thing only* (subject to being split) (easy forgery)

Neither face has anything to co-act by which to prevent forgery; even with bleeding ink *unduly* added.

Neither face, by itself, has any sort what-so-ever of any *vouching*.

In *plain common sense*, the *tree* was not supposed to identify the nurseryman's name; or particularly, to *identify the nurseryman*.

Neither was the man's name supposed to identify the tree. The thing, tag or label, was merely to *weatherproof* the *label*, second column, page 1, of the patent, (139 of transcript) lines 83-84, 87 etc.—(85-3/4 CT.)

There was no such a thing in the mind of Goodsell-Maynard, as preventing forgery, or having proper co-acting in each face, or both faces, independently of one another, as ruled intelligently by the Board of Patent-Office Appeals (53-22/26) (lines 19 to 22 hereinbefore, previously given in full, (turn back to p. 12)

Having already referred to—

“Distr.-Ct.: *gist* of the patent is the *discovery of a solvent*” (20-12/13);—

it must strike as contradicting—

(Distr.-Ct.) “The *problem, according to the defendant* was the *finding of certain inks*” (21-20/21);—

or is “*gist*” not a “*problem*”? (Which is what?)

Moreover, it must be deemed to be nonsense in view of expert's testimony, of which the *Court said*—

“appears to be a very well informed man” (134-7;—and—

“I am accepting the testimony of the patent holder's expert” (in Court-Opinion 21-14/15); the expert having testified—

(Expert)—“for the ink manufacturer it would be the most simple kind of task” (94-28/29).

The *Blaming* of the defendant by the Court for the *evident nonsense* must be deemed unjust, to say the least.

It, moreover, must be flabbergasting, and also shocking, to any honest mind, to blame the defendant of having seen any sort of problem in things that he always pointed out as having been known in the art; while, in fact, the *true evidence* in this case shows extremely and definitely quite the *contrary to both Court-assertions*, as against discovery of solvent, or finding of inks.

The Court received repeatedly correcting answers from the testifying defendant by and to the Court's own investigatings on these very questions—

“Distr.-Ct.: What other feature of the invention do you claim is new besides that fact?” (62-18/19;—

to which the Court received definitely and undisputedly the *true gist of invention* by defendant's answer—

“The feature of having a compound identification that is *interacting*” (62-20/21).

In an informed mind, it should have cleared the question—

“Distr.-Ct.:—Isn't the essential element of this patent that you are claiming the fact that the card beneath this celluloid material is subject to being dissolved by the same material that dissolves the cover?” (62-13/16;—

being answered as short as possible—

“That is a correct part of the invention” (62-17);

the witness having already been intimidated, and put on guard, by having been cut off unduly—

“page—” (62-3);—

the Court cutting in—

“Let us get the evidence, then I will listen to the argument” (62-4/5);

though the above (62-3) could have been completed easily, to have given in short the easily distinguishable features as claimed, with the reference to explanations in specification, in a very short time; in the manner set forth in page 15 herein-before.

The *testimony might have been worded better* if defendant had been *allowed to ever finish his answers* in proper sequence, without such constant interference and undue *cutting off*—

“now the —” (62-19);—

the Court cutting in—

“Just a minute” line 20;—

and again cutting off—

“If the—” line 28;—

the Court cutting in—

“Just a moment” line 29;—

and again cutting off—

“and also—” line 2, page 63 of transcript;
the Court cutting in—

“Not What? (63-3);—

though this all could be believed to have been unintentional and only due to anxiety by the Court of wanting

information; but it could not possibly justify the Court's criticism at another time, addressed to defendant's counsel—

“Distr.-Ct.: you are not going to place the responsibility on the court for the witness not telling his whole story” (131-25/27);—
while the witness had, in evidence, shown to have been more than willing to tell his story, if only the Court had not cut off the sequence of the story; in addition to the first answer on the previous page 18 here, the witness had also said—

“And if the identification *matter* were not *compounded*” (63-1/2).

In answer to the Court's—

“Not what?” (63-3);—
answer *rushed*, to not be cut off—

“That the different parts of the identification, *this part* of the person's identification, and *this part* of the person's identification are *co-acting* under the same solvent.

“A *co-acting* feature, as I say, is absolutely essential.” (63-4/7).

During all this, the testifying defendant had been referring to parts of the copy of the patent in issue in the hands of the defendant.

The Court distorting, or misquoting even (63-4/7)—

“That is what I am trying to say in a layman's language, that this card could be put between two

pieces of celluloid material, such as we have here, and clamped with heat and pressure, and if the printing matter were not subject to being dissolved by the same solvent that dissolves the cover, *you wouldn't claim* it was any novel feature, would you?" (63-8/14);—

which the witness could only correct—

"*to quite an extent*, your Honor" line 15.

There could, and would, have been a clear case before Court, and in the record, *without all the stuff of irrelevant injections by the opposition*; and there would not have been wedged-in, rushed, evidence; to have made unnecessary the undue Court-outburst—

"Distr.-Ct.: You have spent an hour and a half, and I haven't learned one thing yet that hadn't already been called to my attention in the *pre-trial statement*, and from a study of it again." (86-16/19).

Yes, in my pre-trial brief, demanded by the Court, I had given a clear picture of facts, showing that the Lyons had been in communication with me on this identification ever since before the patent issued, though they do not inform a new client of their own knowledge of art, according to sworn statements on their side; and I had answered every patent cited by them; but, with such and similar criticisms, as above, defense-counsel came to the point of *daze*—

"Defense-counsel: I understand the Court doesn't care to hear any testimony as to what these patents cover, and the other files, that you

are sufficiently familiar with them?" (131-17/20);—

the Court's answer being self-explanatory—

"Distr.-Ct.: I don't know that I understand them. *I am not going to foreclose you.* But I don't need an expert to tell me what the English language means. *I am not going to foreclose you.* I will pass on it when the time comes. In other words, you are not going to place the responsibility on the court for the witness not telling his whole story" (131-21/27). (plain Engl. p. 15 & 16 here)

That such general attitude prevailed throughout the trial is, perhaps, best explained—

"Distr.-Ct.: I think it is one of the greatest *rackets* in this country, myself" (66-67); clearly applying to *a little man trying to get profit* out of a patent; when such is *the very foundation of our Patent Laws*, largely *in agreement internationally*. (not just in this country at all, even if a Court says it) explained—

"Distr.-Ct.: I don't know whether I understand it thoroughly. I never examined a patent yet when I felt that perhaps I understood it thoroughly, and my experience has been that counsel is generally in the same position" (57-16/19);—admitted layman, calling all counsel ignorant?!

No wonder, opposition-counsel got bold, when Court, perhaps unwittingly, helped the opposition, in creating nothing but confusion in Court and in the case; the opposition daring—

“Frederick S. Lyon: We object to that, your honor, as *incompetent*. In this case the *patent speaks for itself* and states what it is” (57-5/7);—
(*Why not let it speak?*)

answered, and yielded to—

“Distr.-Ct.: I think the objection is good. The *patent speaks for itself*, counsel.” (57-8/9) addressed to defense-counsel).

No wonder, the defense-counsel became dazed. Why, then, did the Court recite the whole claim twice (57) and (60)? with an air and attitude of wanting answers to it?—while the Court, at such important moments, though otherwise asking defendant directly, contrarily, rebuking witness-defendant—

“Distr.-Ct.: *No*. I am asking counsel” (60-11);—
and also contrarily—

“Distr.-Ct.: *Just a moment*. Let counsel do the arguing and talking. You are a witness now” (65-19/20).

It would take a strong mind, in view of—

“Distr.-Ct.: We are going in a very haphazard manner, partly argument and partly evidence.” (62-5/6);—
considering the many pages of the printed record, directly under leadership, and almost urging, from the Court—

“Distr.-Ct.: But isn't this a fact, that there was no patent cited here that had this bleeding ink feature?” (84-11/13);—

and though the answer was wedged in—

“Witness-defendant: Yes sir; there was no bleeding ink feature in any identification card previously” (84-15/16);—but again —
the Court was *leading* into a *long argument* of *pages* in the record; even contradictory, self-contradictory, and nonsensical mere argument; both plaintiff-counsel contradicting each other and contradicting themselves in their individual statements;—*instead of—*
allowing the witness-defendant to bring, and complete, his evidence, then, and first, *while he was on the stand*, and without undue interruptions.

A forger knows well enough that stable ink gives him no difficulties, he can pick out what he wants; but he also knows that bleeding ink will run out, and he will not even attempt forgery.

The Lyons know well enough that—

——the ink alone is not the gist of this invention; but consideration should be given to—

- (a *compound* structure of the identification—
- (proper, containing personal designation, and,
- x-(*FURTHERMORE* vouching means;
- (in its absolutely essential parts, *co-acting*;
- (by which an *ink* can be made to become effective
- (in conjunction with such a *compound* structure.—

The Lyons did not worry, as long as the Court could be kept arguing, such as—

“Distr.-Ct.: I am a layman, when it comes to this special art, but when he tells me that a certain patent is in a different field, or that it is not really

prior art in so far as his patent is concerned, that is a question for me to pass upon.” (85-22/28);—
contrarily—

“Distr.-Ct.: But he can explain the workings of *this* patent, *explain anything about the art*, and *I am interested*, because I am a layman, when it comes to this special art” (85-22/25);—
and then again contrarily—

“Distr.-Ct.: Well, I think it is a question for the Court, *I am not much interested* in the expert telling me how I am to construe those patents” (84-9/11);—
and again—

“Distr.-Ct.: I feel that an expert can tell me anything he wants to tell me, but when he starts to make his conclusions as to the effect of certain cited patents he is intruding upon my function, because, after all, that is something that I am going to have to determine” (85-10/14).

How could it possibly be done otherwise than by comparing with, or distinguish over, old, or other art?

“Distr.-Ct.: As I understand the law, those claims must be considered *with* the evidence”.

Fine and good; but, without listening, or without giving any consideration to the contention of the defendant; how can an admitted layman get an unbiased view of both sides? How can he determine difference? or pass upon novelty, novel over what? Without comparing with prior art, *without* the help of *contentions* from *both* sides?

Just by accepting the *evident-untrue, unsupported, unproven, mere assertions of an untrustworthy counsel?* or his just as untrustworthy client? as evident from this and the next page 27, to result in—

(20-12/13) herein-before pp. 13 and 17;—

(20-20/21) herein-before p. 17.

Is the following boldness, then, surprising?—

“*if it is a bleeding ink*” (64-16) (Fred. S. Lyon)
(the Lyons thereby admitting to know other than bleeding inks);—

“*No*” (66-10) (F. S. Lyon);—

“*It positively will not*” (66-11) (F. W. Lyon);

“*All ink will dissolve*” (Lyons’ brief C. C. A.
9, p. 15, line 22);—

“*undisputed testimony of Appellant’s expert*”
(line 21, same brief);—

“*testimony of Appellant’s expert witness is true*”
(line 24, same brief);—

“*undisputed at any place in the record*” (line
25);—

Came, then, their client *Whitehead*—

“*All the inks bleed more or less*” (121-
11/12);—(Whitehead saying one thing)

“*Kirk was manufacturing it*” (121-11);—

“*I realized that these cards would have certain
advantages if they had a bleeding ink*” (121-
18/21);—(Whitehead saying another thing) (con-
tra 11/12)

Who could possibly believe anything of such men?

Not only making themselves untrustworthy by such
self-contradictions; they gave even the *means by which*

to make themselves still *less trustworthy* by acknowledging the *expert* to be "*true*" and "*undisputed at any place in the expert-record,*" to make the following of so much more weight *against themselves*—(only a few samples)

- (Expert): "precipitating the pigment" (100, last line);—
- " "absorb into the surface" (104-28);—
 - " "bond itself into the fibre" 105-22;—
 - " "some of the pigments are resistant to the action of these fluids" (95-26/27);—
 - " "There is *no such thing* as a totally *soluble carbon*" (96-31/32);—
 - " "*This black is the pure carbon*, and there would be *no obliteration there at all*" (97-11/12);—
 - " "pigment remains after the vehicle has been washed out" (104-29/30);—
 - " "*bleeding* of color is an entirely different proposition" (105-5);—

to make it definite that *not all inks dissolve nor bleed.*

A forger will, eventually, not find it so difficult, to put the precipitated pigment back under a new cover, to let the cover be the carrier; since we never leave *matter* on an open surface; and the forger should not find it so difficult to retain whatever he wants for his forgery, no doubt having practiced sufficiently not to wash, or wipe off what he means to keep in as good a shape as he may be able to manage.

Additionally, Whitehead exposed himself as being no expert, nor even any sort of man skilled in the art, by boldly testifying that—(*put under heat & pressure?*)

(Whitehead)—“*does not make any difference*” (122-11);— reinforced by a second answer—

(Whitehead)—“*not a bit*” (122-14);— having also testified Interrogatories before trial—

“Whitehead: between the two sheets and place the same in a hydraulic *hot* platen laminating press” (74-1/2) (meaning under heat and pressure);—

not easily brought into agreement with the *acknowledgedly-undisputed* expert—

“expert: *The minute heat was applied to it the red would turn to brown*” (105-30/31);—

in other words, an expert would visualize to-be-expected conditions, and make his tests accordingly, which is a common procedure of scientists, *of which Whitehead knew nothing; making his so-called test-sheet—plain bunk.*

Neither did the opposition make any effort to bring any expert, nor men skilled in the art, to contradict either defense-expert or defendant.

The claim should, therefore, stand undefeated; since, clearly, and undisputedly, having the emphasizing definition—

“TO THE EXTENT”;—

which must be connected to three distinctly-defined features—

“to disclose tampering”;—

“associated”;—

“to dissolve”;—

to be read—

“to dissolve—to the extent”;—

“associated—to the extent”;—

“to disclose tampering—to the extent”;—

(*dissolve* is thus not absolute, or to be held alone) and all of which have reference to—

“MATTER”;—

which, in turn, is a *compound* conception and *structure*, and of a particular combination in itself (45-36/44) and (46-29/37) (of transcript) as quite elaborately set forth throughout this case, and herein-before; being, furthermore, defined in the claim as —

“*distinguishing-matter*”;—

(in a similar manner as a ‘*connecting-rod*’ would not exactly be a mere *rod*, having something to connect).

MATTER has parts to co-act for distortion; and the above several features result in—

“*distortion*”;—

by any—

“*contacting-solvent*”;—

constructed so that a forger will not fancy to try.

<u>distinguishing)</u> — (to dissolve) — (TO THE EXTENT) — (reaching	
— matter) (and)	(matter
with) (associated) —	— (<i>distortion</i>
card & cover) (so as to)	(by
(disclose)	(contacting—
(tampering) —	(solvent.
— — — — —	<u>dissected claim.</u>

This whole case, and the Ballou-patent, should be deemed to be clearly defined; and the *mistakes by* and in the *District Court* should be found to be *contributing to more mistakes in the Circuit Court*, to require a *certiorari* to review both; since it must seem *impossible otherwise* to ever rectify INJUSTICE recorded—which however is in the public interest, whether I profit or not; and a reversal could be difficult without one of both, with such, and so much, interlaced contradictions. (pp. 3,⁴12, 13 here)

Though the District Court remonstrated principally against taking any action for review, on the ground of having no authority; I submitted that evident mistakes had been made in that Court, which the Court even admitted on motion-day; but denied review.

As a matter of fact: *with the first brief* submitted by my side *after trial*, with due consideration of the suggestion by the Court—

“Distr.-Ct.: It is just argument, that is all, a form of witness’ testimony” (132-16/17);—*cases were supplied*, that should easily have supported the patent-claim, on the ground that *we had new structure* besides new combination, *if gist of invention* and defendant’s testimony thereto had not been ignored, in face of Court’s own questionings during trial. (57 to 64 of transcript).

Inventions of poor fellows would be worthless; if an honest litigant is deserted by his counsel at an in-

opportune moment, if cases can be held up in lower Courts, if unjust professional purging can be practiced, and if *gist of invention can be disregarded in final adjudication* of whole patent; and, then, the Highest court could not give consideration at any time after delayed information is received that case is closed in lower Courts (8 to 10 here).

Undeniably, there is *friction* between Court-counsel and Patent-Office-counsel. *Myself* being an engineer of over 45 years standing, for over 35 years in California, and having been registered for over 25 years, to practice before U. S. Patent-Office; I encountered insurmountable *difficulties to find any good lawyer to represent me in Court as required by Court-Rules*; and the representation I had in Court speaks for itself, not at all saying anything against the integrity of the gentleman; but, of course, Courts do not help in selection of counsel and are not responsible for results; though it must leave the bad taste, visible to the public, of an attempt to eliminate an honest competitor, or *purging non-Bar members* from doing honest patentwork, *leaving undue stigma*.

It has often been said that *an inventor or a patent owner would be able to present a clear case* better than untechnical lawyers, not saying that all lawyers are untechnical, and not saying that inventor or patent-owner should take over the whole procedure; but a reasonably free testimony, and some voice under special permit of Court, could serve JUSTICE in patent

cases, and also could make it easier and simpler for Courts.

In this case, *instead of Court assuming gist; if defendant as witness had been allowed to finish his answer (62-3)*; the Court could have been saved the embarrassments, such as presented in pages herein—(pp. 14, 15, 17, 18, 19 and other places); and, if the dazed condition of defense-counsel had not been created; *pre-trial disclosures made to the Court, such as many proofs that plaintiff-counsel was very much informed of Ballou invention as far back as even before issue of patent; and many letters to show that defendant-patent-owner had given information all over the United States, including to Kirk of whom the plaintiff testified having obtained information for his manufacture, though information from Kirk should eventually be considered information from Kruger, as far back as October 1935; the Court quite frequently referring to such pre-trial information. (86-16/19) (37-17) (135-7) (134-17)*; should have eliminated any doubt of validity and infringement.

Under existing Court-Rules, the defendant could do nothing about the dazed condition of his counsel; but Court statements, such as—

(1) “It is just argument, that is all, a form of witness’ testimony” (132-16/17);—
and (p. 22):

(2) “I don’t know whether I understand—my experience—counsel—same” (57-16/19);—
the first statement clearly suggesting that the brief

could bring matter that otherwise would be presented by witness; to which opposition-counsel agreed by saying—

“Frederick S. Lyon: Yes. Of course, that can be brought out in a brief very well, I think to the best advantage and, that being the case, as you say, the patents speak for themselves, and we can point out anything in the patents in our argument or brief that the witness can point out in court” (132-8/13).

With this stipulation in Court, explanation on patents should be admissible in a brief; though, considering the second Court-statement, together with the just here argued Court-statement, it would seem that the Court-Rules might just be amended sufficiently to allow a defendant or patent-owner to give voice to evident mistakes or open disputes that could quickly be settled to the advantage, *for shorter records*, eliminating a lot of irrelevant nonsense.

It rests with the Supreme Court, to help the general public, and, particularly, the poor inventor.

Moreover, this Court could not possibly blame me if this case became so unduly involved and voluminous. The blame should belong to a false opposition-counsel, free to inject so much *misleading* nonsense, eventually, only due to *Court-Procedure* that has not been given a chance to advance with times; eventually even made worse.

Our Patent-Laws and Highest Court Decisions used-to-be quite-well-settled for many decades; particularly

—*disclosure in patent must be so clear that a man skilled in the art can make it*—;—

while recent Rulings suddenly practically amount to—

—*if a man skilled in the art can make it, then, the new disclosure is no invention*—.

and *that* even if, as in this case, no man skilled in the art succeeded, though it was badly needed and wanted in public life, evidenced by *over fifty (50) years of attempts with nothing but utter failures*; the opposition themselves having cited such attempts, one of them—

“Identification-Card by Barnim L. Behrendt of Chicago, Cook County, Illinois, patented in England under number 1513 of 1892”;— (5) near the bottom of the page in the printed transcript, giving number and year; and the same citation in (18);—

the reference being obviously dropped by opposition in realization of being caught on it.

In order to make anything of such known art into an “identical” anticipation of our Ballou-patent; several patents, ideas, and structure would have to be found and picked, here and there and elsewhere, other-than-just-Goodsell-Maynard and/or Walsh-Caprio; and any more pickings would still have to be reconstructed and constructed particularly as set forth in lines 36 to 44 of the patent, page 1 (45 of transcript)

and lines 29 to 37 of page 2 of patent (46 of transcript) before any such combination, or new structure would ever be effectively operative as in Ballou.

Yes—

“patent speaks for itself” (132-11)
and (57-6/9) Court and opposition agreed, and admitted; so—

**LET IT SPEAK*.*

Opposition demanded, or whined, or complained—

“Frederick W. Lyon: I would like to know the definition of the word ‘identification card’ ” (84-22/23);—

when they knew better than was pretended in Court; they being the ones to have cited all such things in their suit, only to make trouble and to make it look much.

Such falsity in Court should be stopped. The Supreme Court has the power to prescribe general Rules, and has done so. (Act of June 19, 1934, s. 651 #1).

It is humbly prayed to consider delays (pp. 8-10) favorably, and accept this petition of a layman.

PRAYER

Petitioner prays that a writ of certiorari issue to review judgments and decrees of the United States District Court and the United States Circuit Court of Appeals, that said judgments be reversed, and that this Court decide the questions of seeing to it that JUSTICE be done besides observance of Law, and deciding other questions to stop a practice that can only heap discredit on honest lawyers and an honest profession, against which there does not seem to be a chance to protect integrity and good name, but leaving the worst sort of stigma. (*Questions pp. 11, 12*)

Respectfully submitted,

OTTO H. KRUGER,
Otto H. Kruger, Petitioner.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles,)

Otto H. Kruger, being first duly sworn, deposes and says, that he is the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true, including statements on the Ballou-File-Wrapper misappropriation stated in page 51 hereinafter, and whole matter of 50.

OTTO H. KRUGER,
Otto H. Kruger.

Subscribed and sworn to before me
this 4th day of June 1947.

Jessie M. Williams

Notary Public in and for the County
of Los Angeles, State of California.

My commission expires October 18, 1950.

In the
SUPREME COURT OF THE UNITED STATES

Otto H. Kruger,
Petitioner,

vs.

Ned Whitehead, doing business
under the fictitious name of
Whitehead & Co.,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

Opinions and Judgments

The extreme self-contradicting nature of opinions and judgments is so absolutely evident from the foregoing petition, that it should be understood if time were available for this Court to study the whole matter carefully.

Many totally unfounded assertions had been made by the opposition, and the Trial Court was misled thereby, to become inclined to assume conditions that are absolutely *contrary to evidence and very plain and well-known facts*.

The cause of all the trouble, undeniably, is in the fact that the Memorandum-Opinion of the District-

Court is based on a rash *disregarding of the gist* of invention.

It is difficult to conjecture on the reasoning of the lower Courts in avoiding review, considering the *irreconcilable contentions*, set forth in pages 12 and 13 of these papers, to make p. 13—"decree affirmed" of the Circuit Court incomprehensible.

Moreover, the *self-contradicting* p. 17 of the District Court is even self-condemning, considering District-Court's *acceptance of the expert*, who had testified quite adversely.

The District Court then *blaming* witness-defendant pp. 17 to 21, must seem unpardonable, coming from the Bench, which *added even insult* to the previous blaming when *ignoring the testimony* of the witness entirely several weeks later in the Court-Opinion, on the points of *Compound-matter* on which the Court had made so much effort in procuring it.

Pages 14 to 17, on the other hand, show the *Lyons'* efforts, to do their part, to confuse the issue, and to *daze defense-counsel* to the detriment of defendant and Justice.

The *undue arguments* while witness-defendant was on the stand, the *cutting-off and distortions of witness'* testimony, and *not allowing witness to finish* a short and plain statement on the claim, by which the Court action could have been very short and effective; pp. 18 to 23 *not exactly making PROCEDURE* more dignified to a plain honest layman.

Invention and Cases Supporting It

(a) The *very preamble* (45) of the Ballou-patent defines this patent as being for—

“devices used by an individual person for the sake of identification before, or to, or with another person”;—

further down in the patent-specification giving us a clearer definition of true identification-*distinction*—

(1) “it *must* contain something that is original and distinctive with or by the holder”;—

(2) “*furthermore* be in a form to be quickly and readily recognized as such”. (lines 36-44)

Two distinct parts in MATTER as a minimum-stipulation, to make it the—

“*DISTINGUISHING-matter*”

of the claim; and making it—

“A positive and reliable identification.” (line 42)

Opposition’s cry for definition of “identification-card” (p. 36 herein) (84-22/23) is, thereby, made the *worst pretence*, just childish-ridiculous, and irrelevant to the issue.

The above-recited *part (2) of matter* is undeniably set forth throughout the patent specification *elaborately*; particularly, in the second column of page 1 (45) (18-25).

(b) With the District Court's—

“... witness' testimony” p. 2, a-3 in full;—
and with the 'Trial-Day-Finale—

“... quite unique” p. 2, a-1 in full;—
it should be deemed to have been reasonably-to-be-ex-
pected, that the Court would give some weight to its
own questionings of the witness-defendant (57 to 64
and other places in the transcript) (here in part, pp.
13 to 23);—whereby it had been emphasized that *MAT-
TER is compound*; comprising the new *co-actingly-
constructed feature (1)-(2)* of the previous page here;
—besides new combination of this new structure to-
gether with the two other features of being *securely
encased and having a coloring*;—by which all these
features are *uniformly co-acting*;—

uniformly between (1)-(2);—and—

uniformly between cover and (1) and (2);—

furthermore, since the cover is adhering to card and
1-2, but capable of being distinguishably released in
the same manner, it is also—

uniformly between cover, (1), (2) and card;
this being positively and completely novel.

(c) *Direct co-acting of any sort of (1), with any
sort of (2) in one of, either face does not exist in
either, Goodsell-Maynard, nor in Walsh-Caprio; nor
in any sort of combining of those two patents;—(in
the words of)—Appeal-Board:*

“references show the solubility of the ink and film
in a common solvent but for an entirely different

purpose and the adoption of this idea in the Goodsell et al structure would have no object at all" (53-22/26).

Though this Appeal-Board's-Decision referred to other patents of the same nature, the application to the combining of Walsh-Caprio and Goodsell-Maynard is obvious, to condemn the opposition's attempt as what it is.

This reference to the Patent Office Appeal Board's Decision makes it clear that Goodsell-Maynard did not have the ink; but other references did have it, cited together with the Goodsell-Maynard patent by the Primary-Examiner out of the Office File and submitted to the Board of Appeals.

Moreover, common public knowledge, in fact *every-day-experiences of the whole PUBLIC*, is sufficient to settle the question; that a common "*CHECK*", or any similar paper is *no identification*; no matter if it shows the *name* of the bearer on the *best of so-called safety-paper*, or on *pretty picture*, such as *Walsh-Caprio*;—no identification.

Goodsell-Maynard could not possibly help Walsh-Caprio;—since the Goodsell- definitely sets forth specifically—p. 16 here—having *only one thing on one face*, and *another one thing on opposite face*; to make Lyons' attempt along this line only their well-practiced and often-injected *same old prevaricating and equivocating*; or, in the words of the Appeal-Board—

“would have no object at all” to combine those two old patents either way *pretended*.

There would, then, still be nothing to co-act in either face; neither of those parties having had any such idea along such lines.

A forger can easily split their cards, easily recognizing the different parts on separate faces (the Patent-Office-Experts having visualized that possibility) (the real reason for the rejection of claim 6); *throw away the undesired half*; glue another desired half to the back of the retained half; to make it a perfect forgery, which no expert could possibly detect on a mere glance.

This *Appeal-Board's Decision* was, therefore, made the *principal exhibit by defendant*, without any sort of hesitation for the *success of his case*, as a *piece of known art* on the points of solvent and ink, in which the inventor, and here also the defendant relied for the *new structure, and new combination with such old art*.

One will have to pick here, and there, and elsewhere, etc.; and, then, construct it according to (a, p. 41 and pp. 29-30 herein); before it becomes effective as in the Ballou patent.

It would, then, be ridiculous, and preposterous, to follow opposition's contention, that Goodsell-Maynard and/or Walsh-Caprio could ever possibly in any way or manner anticipate the Ballou patent 2,038,567.

It is also preposterous, for the opposition to now cry that Kruger is estopped from claiming anything else; when Kruger has three times in almost direct succession in one page of the pre-trial Deposition answered the Lyons in their office under oath, that ink or solvent is not the invention when taken alone but can be had on the open market; furthermore, that the claim is of a “contracted”—form, with reference to the—

“phrase, ‘To the extent’ . . .”, page 5, Dep.; — and Kruger has maintained the same thing ever since; never anything else.

It is the Lyons, who have prevaricated and equivocated until no one seems to know where they stand, that even the Courts are misled to fall into contradicting—statements, to make Opinion and Judgments what they now are.

The Lyons did not advise their client Whitehead to use the non-co-acting combination of Goodsell-Maynard added to the-just-as-irrelevant-Walsh-Caprio! NO! Quite obviously, the Lyons, rather, INDUCING *their client Whitehead to copy the Ballou-patent most closely and accurately, AND ADVERTISING the fact of their copy (71); thereby admitting invention in infringed Ballou-patent; because—quite evidently—they could never have sold their product to the many users they are giving us in such of their lists of ad-*

vertisings (71) (transcript) in any other form but Ballou's.

The Ballou patent, most certainly, *must* be deemed to have *other parts besides just ink in MATTER* than could be possibly found in their two *pretend-combined-references*, to make such a perfect identification in Ballou, worthwhile to be copied most closely.

(d) In other words, the Ballou-patent has points (1) (2) p. 41 herein, only needing a showing of cases in support. (*submitted before Opinion and before Judgment*).

Peculiarly, *such cases* were submitted with the *briefs after trial* under demand of the District Court for such cases, and *they have been in the hands of the Courts ever since*; only, obviously, *never having been applied to the gist of invention* here elucidated. *WHY NOT?*

(d-1)—Taking *known elements* used in a patent—Loom Co. v. Higgins, 105 U. S. 580, at page 586 makes it clear that a patentee is not obliged to specify or detail such things, as here ink, or solvent, or manufacturers; which should favor our case, especially when it was acknowledged throughout this case, even by the Courts, that such things were of common knowledge, Mr. Justice Bradley having pointed out that one may begin—

“at the point where his invention begins, and describe what he has made that is new, and what is replaced of the old.

That which is common and well known is as if it were written out in the patent and delineated in the drawings”.

(d-2)—as to *man skilled in the art*. *Whitehead* never established himself as an expert, nor even as a man skilled in the art by his self-contradicting; Court saying—

Distr. Ct.: “who is not an expert, because he said he was a salesman until he started in his own business in 1942” (135-10/11);—

while in *American Stainless Steel Co. v. Ludlum Steel Co.*, 290 Fed. 103, at p. 107—

“It follows that we are of opinion that these patents are to be interpreted in the light of what their disclosures would mean to one accustomed to the art of making steel, or to a metallurgist, and not to one who was concerned only with the forming thereof into implements of industry”;—

the application to our case being obvious.

(d-3)—*broad claim—variations*. Courts commonly accept the viewpoint that claims can be written broadly so as to include reasonable variations; thus we find in—*Minerals Separations, Ltd. v. Hyde*, 242 U. S. 261, at 270—

“... variation of treatment must be within the scope of claims ... *certainty which the law requires in patents is not greater than is reasonable* ... obviously impossible to specify in a patent the precise treatment which would be most successful and economical in each case ... while leaving something to the skill of persons applying the invention ... *sufficiently definite* to guide those skilled in the

art to its successful application . . . *This satisfies the law*” Other cases agreeing—(emphasis mine)

Mowry v. Whitney, 14 Wall 620, 20 L. Ed. 860;

Ives v. Hamilton, 92 U. S. 426;

Carnegie Steel v. Cambria 185 U. S. 403; 46 L. Ed. 968.

(d-4)—*Opposition's and Court's mistaken interpretations.* Did plaintiff in his advertisings mean a plain calling card? When he praised his “identification-card”? Courts have said a lot about such things, and that type of infringers, as in *Railway Co. v. Sayles*—

“We see the strength of the concessions to its advance beyond the prior art and of its novelty and utility by . . . imitation of it . . . The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary” in principle agreed to by—

Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, pp. 440, 441.

Practically the same viewpoint being expressed—

“The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think”

Kurtz v. Belle Hat Lining Co., 280 Fed. 277, C. C. A. 2.

(d-5)—besides new structure; *combination*. (p. 42 here) Cantrell et al. v. Wallick, 117 U. S. 689, Mr. Justice Wood saying—

“The first defense is based on the theory that a patent cannot be valid unless it is new in all its elements as well as in the combinations, if it is for a combination. But this theory cannot be maintained.”

(d-6)—*evidence of invention* by many years of utter failures, need of product in public, attempts.

In Carnegie v. Cambria, 185 U. S. 403, 46 L. Ed. 968—

“it did not, for years, occur in this light to even the most skillful persons . . . now that it has succeeded, it may seem very plain. . . . This is often the case with inventions of the greatest merit. . . . it is evidence of invention.”

In our case, the opposition cited the English patent 1513 of 1892, over fifty (50) years old; showing that attempts have been made for many years, though all obviously utter failures, and not practical as our Bal-lou; opposition avoiding to get their own reference printed in the transcript, obviously only, not to be condemned on their own reference; but it is noted twice (5) and (18).

Yes, as the District Court said—

“District Court: As I understand the law, those claims must be considered with the evidence”

134-13/14);—

and the evidence, in this case, ought to be deemed entirely in favor of sustaining the Ballou-patent; since the opposition did not make any honest attempt, or effort, to bring any honest evidence.

If the case were so clearly in favor of opposition;—and if *opposition honestly believed* anybody to be able to produce adverse evidence;—why should they have had to *stoop to inducing their client*, plaintiff Whitehead, to *impeach himself*;—and why should even plaintiff's counsel *both of the Lyons*, have had to *impeach themselves* on their official oath, with the *worst sort of falsehoods* and repeated attempts to mislead the Courts?—

Starting even before trial in their pre-trial-brief, saying—

“This patent was not referred to in the proceedings before the Patent Office leading to the grant of the Ballou patent and the usual prima facie presumption of validity of the Ballou patent is thereby overcome” (lines 26 to 29 of their brief of July 13, 1944);—

while, in fact, the patent had been cited early and was the *principal reference all the way through*; the *primary Examiner had it*, he carried it to the *Board of Appeals*, not only used to refer to it, but the Board made it the principal reference on which to rule, overruling this reference, and allowing therewith the broadest claim of the Ballou patent, thus to be issued in claim 1.

An infringing layman; particularly, when he *proves himself untruthful, brazenly contradicting himself within moments; should not be able to invalidate a patent* against which no proof of fault has been brought by opposition in any part of *any sort of evidence*.

Lyons even misappropriated Ballou's File Wrapper, from which they, as lawyers, could not possibly have denied, the above quotation to be *brazen falsehood*; Frederick S. Lyon bluntly telling me after trial (walking with me out of Court to escalator) that the *File* they had just then introduced as their evidence *was Ballou's, thereby mine, and I could ask Court for it*;—after they had refused my counsel to return it, saying it was their's. (oath p. 38)

JURISDICTION

Under the extremely contradicting nature of the handling in the lower Courts, it is humbly pleaded that the Highest Court alone has the power (Act of June 19, 1934, s.651 #1) to rectify the extreme travesty of justice; by giving consideration to official misinformation had. (pp. 8 to 10.)

Notice of the mandate having been recalled to the upper Court from the District Court, p. 8; the Clerk of C. C. A. 9 mailing me a carbon copy of letter he sent to Clerk of District Court, p. 9; and the Clerk of the District Court, then, informing me of holding mandate for spreading upon the minutes of the Court, p. 10;—had to cause me to follow the lead for trying to get reconsideration, or review; which hindered me doing anything else; leaving me without knowledge, or any sort of notice, of any closing of case until *May 12, 1947*.

Gist of invention disregarded entirely—only in favor of or based on falsehoods, pp. 26, 28; *against true, undisputed, testimony*, pp. 26, 27—when District Court accepted as such, p. 17;— leaving no real honest judgment in this case.

CONCLUSION

Litigants, even a poor inventor, or any poor fellow, should have the assurance, that *gist of invention* will not be ignored in the final adjudication of patents; and that such extreme travesty of JUSTICE, as here presented, *can* be rectified; to get a *reversal of previous judgments*; and, therewith, get *recompense of expenses and losses*, caused by an unscrupulous, self-contradicted, untrustworthy, plaintiff-counsel, without having had any cause, since not having proved any damage or anything of his complaint; and *also get validation of patent, injunction and accounting*, against such counsel and client.

The Supreme Court of the United States, having established the Rules, has the capacity to rectify undue advantages taken by others, that Justice may prevail besides observance of law.

It is respectfully submitted that Rules may provide, that a *litigant be informed in reasonable time*, if, and when, petitions, or other side-issues are found so; that the case *should be considered ended and closed* in any of the lower Courts, or Departments, *only after such due notice*; so that eventual chances with higher Departments are *not unduly forfeited inadvertently*, due to lack of notice, *by the litigant*.

Respectfully submitted,

Otto H. Kruger
OTTO H. KRUGER,

Otto H. Kruger, Petitioner.

TOPICAL INDEX

	PAGE
Brief in Opposition to Petitioner's "Motion to Dispense with the Printing of Record"	1
Brief in Opposition to Petition for Certiorari.....	3
Jurisdiction	3
The Merits	5

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Alexander Milburn Co. v. Davis-Bournonville Co., 270 U.S. 390..	11
Brill v. St. Louis Car Co., 90 F. 666 (C.C.A. 8).....	8
Hubbell v. United States, 179 U.S. 75.....	8
I.T.S. Rubber Co. v. Essex Rubber Co., 272 U.S. 429, 443, 444....	8
Measuregraph Co. v. Grand Rapids Show Case Co., 29 F.2d 263, 275	6
Mettler v. Peabody, 77 F.2d 56, 58 (C.C.A. 9).....	11
Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327.....	6

STATUTES

Judicial Code, Sec. 204d, 28 U.S.C.A. 400.....	5
R.S.U.S. 1008, 28 U.S.C.A. 350.....	3
R.S.U.S. 4888, 35 U.S.C.A. 33.....	15

IN THE
Supreme Court of the United States

October Term, 1947.

No. 200

OTTO H. KRUGER,

Petitioner,

vs.

NED WHITEHEAD, doing business under the fictitious name
of WHITEHEAD & Co.,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S
"MOTION TO DISPENSE WITH THE
PRINTING OF RECORD."

Respondent is uncertain respecting what is to be contained in the Transcript of Record upon which petitioner's Petition for Certiorari is to be determined in this Court.

Respondent has never been served with any notice of the filing of such petition and has been unable to determine precisely what has been filed in this Court in this case. The Transcript of Record upon which petitioner appealed from the District Court of the United States for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit was duly

printed and filed. Respondent has never been served with any copies of such record, containing the addition of a copy of any of the proceedings in the Court of Appeals in this case purported to have been taken. Respondent received from the Clerk of the Court of Appeals a copy of a letter dated June 28, 1947, addressed to this Court wherein it is stated that at petitioner's request he (the Clerk) is certifying to the Clerk of this Court "the original printed transcript of record in this cause with typewritten copy of proceedings had in this court; together with" ten therein identified items, some of which respondent is unable to identify and of some of which respondent has no copy.

On July 16, 1947, respondent received from petitioner a paper addressed "To Ned Whitehead, etc., and his counsel Lyon & Lyon:" together with a carbon copy of a "Motion to dispense with the printing of record." The motion asks "that the Petition may well be deemed to be true to evidence and facts"; without any verification. No ground is presented in such petition for dispensing with the printing of the record. There has been no compliance with either Rule 7 or Rule 26 of this Court requiring that (Rule 7) "(1) Every motion to the court shall be printed, and shall state clearly its object and the facts on which it is based."

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

JURISDICTION.

It is respectfully submitted that this Court is without jurisdiction to grant in this case a Writ of Certiorari to review the judgment of the Circuit Court of Appeals.

R. S. U. S. §1008, 28 U. S. C. A. §350, as amended, provides that:

“No writ of certiorari intended to bring up any judgment * * * before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *.”

The petition herein was not filed within the time provided in this statute.

The final judgment of the District Court was filed and entered *November 15, 1944*. Petitioner's notice of appeal therefrom to the Court of Appeals was filed *February 9, 1945*. The judgment of the Circuit Court of Appeals for the Ninth Circuit (affirming the judgment of the District Court) was entered *February 6, 1946*, pursuant to the opinion of that court of that date. Under Rule 25 of that court its mandate was stayed for thirty days. No petition for rehearing having been filed by petitioner during such thirty-day period, a mandate pursuant to its judgment of affirmance was, on *March 8, 1946*, issued and sent to the District Court. On said date the usual formal notice to the attorneys of record for the parties was mailed by the clerk of the court. A “petition for rehearing” had, how-

ever, been mailed on *March 6, 1946*, by petitioner to the Court of Appeals. This petition was filed by petitioner, and not by counsel for petitioner. Respondent's attorneys have no knowledge when this petition for rehearing was received by the clerk of the Court of Appeals, but on *March 12, 1946*, received through the United States mails a copy of the paper in this case entitled "On Petition for Rehearing" in the Court of Appeals in which petitioner herein stated that his attorney, Mr. Huebner, had withdrawn from the case. Apparently upon receipt of this paper the Court of Appeals, sitting in Los Angeles, California, on Thursday, *March 14, 1946*, entered an order recalling its mandate of February 6, 1946, and granting petitioner herein leave to file a petition for rehearing in typewritten form. On *April 16, 1946*, petitioner's petition for rehearing was denied and notice thereof that day mailed to plaintiff-appellee and to petitioner herein. Upon *April 23, 1946*, the Court of Appeals issued its final mandate to the District Court. At no time thereafter was the mandate of the Court of Appeals recalled by that court. By such mandate its jurisdiction in the case had been terminated.

The petition for Writ of Certiorari herein was docketed in this Court July 9, 1947. This was a year and three months (lacking 14 days) after the final judgment of the Court of Appeals to review which Writ of Certiorari is now sought by petitioner herein.

Subsequent to the issuance of its final mandate in this case, the Court of Appeals never granted any leave to file a petition for review.

THE MERITS.

Respondent filed in the United States District Court for the Southern District of California, Central Division, his complaint under the Declaratory Relief Act, Judicial Code sec. 274d, 28 U. S. C. A. §400, setting forth that an actual justicable controversy existed between plaintiff and defendant, petitioner herein, respecting the validity of the Ballou patent No. 2,088,567, and praying that the same be adjudged invalid and that plaintiff, respondent herein, "have such other, further or different relief as in equity and good conscience the Court may deem, under the circumstances, required." [R. 6.]* Defendant, petitioner herein, answered, admitting plaintiff's assertion that such actual controversy existed between appellant and appellee [Ans., R. 13] and counterclaimed against plaintiff asserting the validity and infringement by appellant [R. 15], praying a final injunction against further infringement by plaintiff, etc. [R. 15]. Plaintiff in his answer to such counterclaim pleaded the invalidity of the patent [R. 16-18]. After full trial on the merits the District Court made findings of fact and conclusions of law [R. 22-24] and entered a final judgment wherein the court held Claims 1, 2, 4 and 5 of the patent in suit invalid and further provided a permanent injunction against defendant, petitioner herein, "from further representing to the trade, and particularly to plaintiff's customers, that identification cards manufactured by plaintiff are an infringement of or that any use of said trade or customers is an infringement of said Ballou Patent No. 2,088,567." [R. 25.] The opinion of the District Court is found at R. 20-21. The Court

*References to the printed Transcript of Record in the Court of Appeals are herein referred to as "R." followed by the page number.

of Appeals affirmed the findings of fact and conclusions of law of the District Court (153 F. (2d) 238-9). The patent in suit is reproduced at R. 44-47.

Respondent submits that this case presents no reason or ground for the grant of certiorari such as is required by Rule 38, subdivision 5, of this Court. No court has sustained any of the patent claims in suit; there is no conflict of decision with respect to the validity of such claims. This Court has uniformly indicated that it will not review concurrent findings of invalidity for want of invention in the absence of any conflicting decisions sustaining the validity of the claims. In affirming the decision of the trial court that the claims of the patent in suit did not require more than the exercise of the ordinary mechanical skill and common knowledge, the Court of Appeals applied the decision of this Court in *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U. S. 327, and the opinion of the Eighth Circuit Court of Appeals in *Measuregraph Co. v. Grand Rapids Show Case Co.*, 29 F. (2d) 263, 275.

The Ballou patent describes and claims a composite card. The purpose of this card is to serve as a means of identification. Such identification may be of a person or other object. Nothing in the patent claims limits the card to any novel thing which identifies a human being from any other animal or thing. To prevent a' teration the identification card proper is enclosed within and united with a transparent cover. Such cover is composed of a material that can be removed by a solvent. The printing on the card is in ink or in coloring matter that will be destroyed or defaced by the action of the solvent in removing the cover [Ballou Patent, R. 45, p. 1, col. 1, lines 45-55].

The patent describes the so-called "identification card" as consisting of a transparent cover within which a card is enclosed, this card being imprinted with, or otherwise carrying, what is termed in the patent "distinguishing matter." The patent does not disclose any novel kind of card, either with respect to material, shape or construction, nor any novel distinguishing matter serving identification purposes. The sole claim of invention is the imprinting of the distinguishing matter (of whatever character) upon the enclosed card in an ink or coloring matter which dissolves when the dissolving solvent of the transparent cover is applied thereto. [Cf. Ballou Patent, R. 45, p. 1, col. 1, lines 47-55.]

"* * * the point is that the identification matter will always be made of a medium dissolvable by the same solvent by which the cover can be dissolved, so that no identification matter will be left on any attempt of dissolving the cover for the sake of obtaining the identification for misrepresentation or alteration." [*Id.*, col. 2, lines 4-10.]

Ballou and petitioner admitted that there was nothing novel in this identification card except the imprinting or forming of the so-called distinguishing matter of an ink or coloring which would dissolve by the same solvent that would dissolve the cover, and petitioner is estopped to contend otherwise. [Cf. rejected and cancelled Application Claim 6, R. 52; testimony of appellant, R. 63.]

The card defined by Claims 1, 2, 4 and 5 of the Ballou patent differs from this admittedly old card of cancelled Application Claim 6 *solely* in printing or forming of the so-called "distinguishing matter" of a material "made to dissolve by the same solvent" that will dissolve the cover.

(*I. T. S. Rubber Co. v. Essex Rubber Co.*, 272 U. S. 429, at 443, 444; *Hubbell v. United States*, 179 U. S. 77; *Brill v. St. Louis Car Co.*, 90 Fed. 666 (C. C. A. 8).)

The Goodsell-Maynard patent 1,071,226 [Plaintiff's Exhibit 3, R. 138-40] discloses an identification card enclosed in a celluloid cover. This cover is attached to the card in the same manner as the cover in the Ballou patent [*Cf.* R. 140, Goodsell-Maynard Patent, p. 2, lines 5-45; *id.* 139, lines 20-26].

The Goodsell-Maynard patent does not disclose what kind of ink or coloring matter is or may be used for printing upon the card or identifying device 4.

In deciding this case the district judge accepted the testimony of petitioner's expert Horwitz, who testified that manufacture of an ink that would *not* bleed has been and still is a problem [R. 105].

"Q. Then there is no ink which could be applied, even today, to cards in these cellulose acetate covers, under heat and pressure, which, upon dissolving the cellulose acetate covers, could be re-coated, without destruction of the printed matter. A. Not without so defacing it that it would be easily recognizable as having been tampered with." [R. 106.]

* * * * *

"The Court: In other words, it has been generally known that there was a solvent that would cut printed matter? A. That is right.

The Court: It is also well known, isn't it, that there is a solvent that will dissolve celluloid material? A. Yes. That also goes back many, many years.

The Court: To a man skilled in the profession there is nothing about the ink combinations here that is unusual? A. No. It hasn't been unusual for the

past 20 years anyway, maybe longer than that. My recollection goes back to the years I was working in the press room, when they were making identification tabs. At the old John C. Moore Corporation in New York City, we were playing around in those days with the fusing together of two parts of celluloid, having a gummed flag of fabric attached to it. That goes back to 1910 and 1911.

The Court: Has there ever been a time when you have before been confronted with the problem of working out an identification card? A. No, sir.

The Court: Is that the first time? A. This is the first time, to my knowledge, and, if I may elaborate on that a little bit, I have covered the graphic arts field for 40 years now, *and there has never been a time or an industry other than the one created by the present emergency that made that kind of thing necessary and essential. In this war they have found this kind of thing completely essential and necessary in the creation of small industries, this identification proposition.*" [R. 102, 103; emphasis supplied.]

* * * * *

"A. * * * No printing ink has yet been made that will withstand the action of acetate solvent. All vehicles that are used in printing ink will break down under the action of any acetate solvent." [R. 95.]

* * * * *

"The Court: I understand from your testimony that, generally speaking, any celluloid material that can be dissolved or that is susceptible of dissolving, the solvent would also affect the ink? A. The same solvent would affect the ink, yes, and I think the word 'affect' is used advisedly there, because it would affect it in varying degrees. In some instances it will take

it out completely, and in others it will take it out in more modified ways and in other cases it would destroy the fabric of that ink. The ink is no longer the same after it has been hit by that solvent.

The Court: I think that is all.

Redirect Examination.

Q. By Mr. Franklin: You say that different solvents affect the ink to different degrees. That being the case, would you say that all solvents that would dissolve cellulose acetate would be sufficient to dissolve the ink in such a way that it would show up on the card to show that it had been tampered with? A. I would say that any solvent that will take that cellulose acetate off would affect the printed matter there to a degree that it would show tampering." [R. 110.]

The problem in ink manufacture was not to produce an ink which would not bleed or run or be defaced in a cellulose solvent. The difficulty with the earlier inks was this bleeding and dissolving. Petitioner's expert, Horwitz, made this clear:

"Q. Is it not true that for 20 odd years or much longer that ink problems have had to do with producing a fixed ink? A. Will you explain what you mean by a 'fixed ink'?

Q. An ink that would not dissolve, bleed or leach in alcohol esters. A. It is still a problem.

Q. You haven't succeeded ever in manufacturing a fixed ink? A. Not for the printing and lithographic arts, industries, no." [R. 104.]

The Walsh-Caprio Patent 2,079,641 [R. 154-6] discloses a process of making an integral structure of manufacture comprising "a plurality of sheets at least one of which is

of a cellulose acetate plastic, and at least one of which bears bleeding colors, said sheets joined by means of a sheet of cellulose acetate plastic containing at least 60 parts plasticizer to 100 of cellulose acetate base between each pair of said first mentioned sheets" [Claim 4, R. 156].

The product produced by the Walsh-Caprio process results in the production of an article of manufacture substantially identical with the article defined by the Ballou patent claims. The application for this patent was filed January 11, 1930, almost four years prior to the filing, on October 22, 1934, of the application for the Ballou patent [Cf. certified copy Walsh-Caprio application, Pltfs. Ex. 8]. All that was set forth in such application was made a part of the prior knowledge by the filing of such application and is thereby proven to have been known prior to Ballou's alleged invention (*Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U. S. 390). This patent was not considered by the Patent Office in the negotiations for the grant of the Ballou patent and the usual presumption of validity of the Ballou patent is thereby overcome and the court called upon to determine the issue of invention as a matter of first impression (*Mettler v. Peabody*, 77 F. (2d) 56, 58 (C. C. A. 9)).

The Walsh-Caprio patent states that:

"An object of our invention therefore, is to provide a cement which will not cause blushing, bubbles, or pockets and will not cause colors to run or bleed" [R. 155, col. 1, lines 19-22].

The drawings show a print or card 1 "having a paper base" and "having an outer colored surface" [R. 155, col. 1, lines 44-47].

"It is assumed for the purposes of illustration that the color or colors of the print 1 have a tendency to run or bleed when the ordinary volatile liquid solvents or cements are used. To overcome this tendency of the colors to run or bleed, we use between sheet 4 and print 1, a cement 5 in sheet form comprising substantially non-volatile solvents for the cellulosic plastic, preferably combined with at least a small proportion of the particular cellulosic plastic. The presence of at least a small proportion of the cellulosic plastic is particularly preferred where the non-volatile solvents are of an oily nature, in order that the cement may be maintained in sheet or other solid form. The use of a proportion of the cellulosic plastic also aids in producing a final product which is substantially homogenous throughout, except for the print or its equivalent." [R. 155, col. 1, line 54, to col. 2, line 12.]

The patent contains complete formulae setting forth in detail the composition of the so-called thermoplastic cements. Formulae A and C refer to cellulose acetate and Formulae B and D refer to cellulose nitrate as the main ingredients, and the other chemicals in the formulae as plasticizers or thinners. "Cellulose acetate" and "cellulose nitrate" as well as celluloid are well known clear, plastic substances, all usable for covering the surface of an identification card. They have no visible physical differences. Either of these corresponds with exactitude to celluloid or the "different transparent materials" which may be used instead of celluloid as set forth as equivalents in the Ballou patent. Petitioner used cellulose acetate in covering his

cards. Further reference to the soluble or bleeding or smearing character of the color or ink is contained in this Walsh-Caprio disclosure [p. 2, col. 1, lines 21-28, R. 156] and it is to be noted that in the article, claims 3 and 4 [R. 156] which claim the composite sheet produced, reference is made to one of the sheets which bears bleeding colors. There is no substantial patentable difference between the Ballou identification card, as defined and disclosed in Ballou's patent claims, and the composite sheet or identification card produced in accordance with the Walsh-Caprio disclosure.

The fact that the print 1 of the drawing of the patent is a picture is wholly immaterial as to anticipation of the Ballou patent. Such illustration would be an identification means for identifying a person or property illustrated. Clearly, it would not amount to invention to substitute for this pictorial representation a man's name in printing or any other identifying matter. Respondent cannot stress too much the fact that the Ballou patent does not disclose or claim any particular identifying manner or means. The material consideration here is that in law the use of the card cannot form the basis for either patentable novelty or patentable invention *in the card itself*. It is not the use of the card that renders the card patentable, but it is the elements from which it is constructed. The Walsh-Caprio patent [Ex. 7] describes as well as claims the things which the Ballou patent claims. The only material difference between the patents to Walsh and Caprio and to Goodsell and Maynard [Ex. 3] is that Walsh and Caprio *recognize that inks will bleed* when subject to the solvents and plasticizers necessarily present in a cellulose cover, and that Walsh and Caprio disclose a cement between the cover and the card which will prevent the ink from bleeding

during the manufacture. The article produced by the Walsh-Caprio process corresponds precisely with the so-called "identification card" of the Ballou patent claims. "* * * the color or colors of the print 1" are described as having "a tendency to run or bleed when the ordinary volatile liquid solvents or cement are used" [R. 155, col. 1, lines 54-57]. "The compositing operation is preferably carried on by first using heat and pressure in a press, or its equivalent, and then cooling without completely removing the pressure" [*id.*, col. 2, lines 19-22].

Four formulae are given of a thermoplastic cement which is termed as "plasticizer." If cellulose acetate is used as a solvent to dissolve or remove the cellulosic cover, such solvent being a solvent of both the plasticizer and the ink or coloring matter, the fact is established that "it would be easily recognizable as having been tampered with" (Horwitz testimony, *supra*, R. 106].

"If the evidence offered by the patent holder is to be accepted, we have no discovery and therefore no patent, while on the other hand, if plaintiff's testimony is to be accepted by the court, we have a problem stated without the solution. Under either viewpoint the patent is clearly invalid.

"In view of the presumption of validity, I am accepting the testimony of the patent holder's expert. The defendant patent holder by attempting to prove his patent complies with R. S. U. S. 4888 has convinced the court that his patent is not the result of inventive genius but at the most required only the work of one skilled in the art. As a matter of fact, I feel no discovery was made. The problem according to the defendant, was the finding of certain inks that would be dissolved or caused to bleed by the same

solvent that would dissolve the transparent covering. The solvents for the coverings were well known, and if, as a matter of fact, all inks would be substantially affected by such solvents, the problem of discovering the proper ink did not exist." [Opinion District Court, R. 21.]

The Court of Appeals also affirmed the findings of fact and conclusions of law of the District Court that the Ballou patent does not disclose or describe the invention as required by Rev. Stat. §4888 (35 U. S. C. §33, 35 U. S. C. A. §33) and is void for that reason.

No question of public importance is presented in the instant case. No principle or doctrine of law as to which there is conflict of decision is presented.

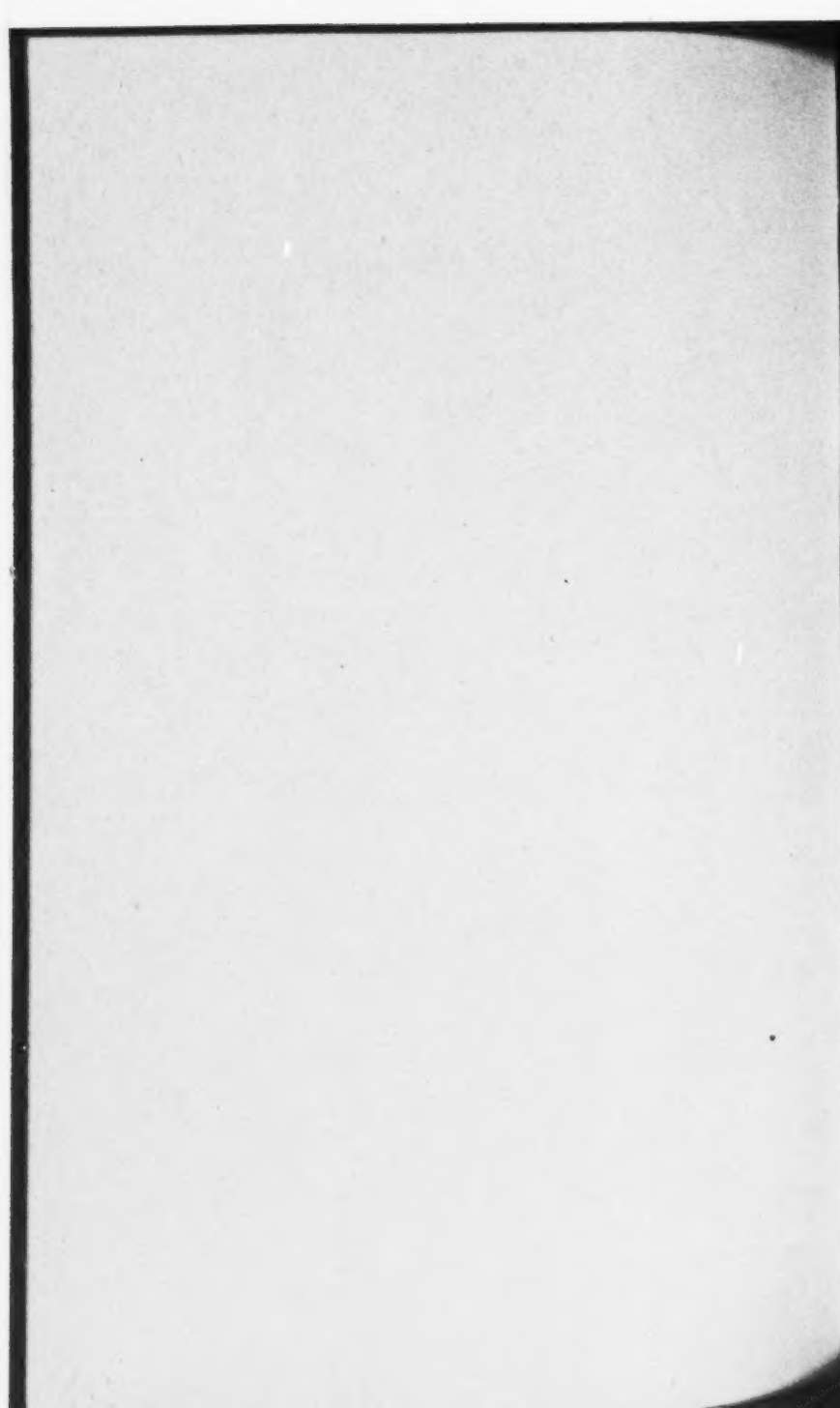
It is respectfully submitted that the petition herein should be denied.

Respectfully submitted,

FREDERICK S. LYON,

FREDERICK W. LYON,

Attorneys for Respondent.



SUBJECT INDEX

	Page
To opposition on Motion.....	2
To opposition on Petition.....	2
regarding claim 6.....	3
Courts' Opinions conflict.....	4
Abuse of Court statements.....	5
magnifying glass	6
Lyons horrified at expert testimony.....	7
Expert not expected to solve problem.....	8
Lyons hysteric, confuse issue.....	9
Conclusion	11
Oath	12

SUBJECT INDEX

1880

1	1880	1880
2	1881	1881
3	1882	1882
4	1883	1883
5	1884	1884
6	1885	1885
7	1886	1886
8	1887	1887
9	1888	1888
10	1889	1889
11	1890	1890
12	1891	1891
13	1892	1892
14	1893	1893
15	1894	1894
16	1895	1895
17	1896	1896
18	1897	1897
19	1898	1898
20	1899	1899
21	1900	1900
22	1901	1901
23	1902	1902
24	1903	1903
25	1904	1904
26	1905	1905
27	1906	1906
28	1907	1907
29	1908	1908
30	1909	1909
31	1910	1910
32	1911	1911
33	1912	1912
34	1913	1913
35	1914	1914
36	1915	1915
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38	1917	1917
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141	2020	2020
142	2021	2021
143	2022	2022
144	2023	2023
145	2024	2024
146	2025	2025
147	2026	2026
148	2027	2027
149	2028	2028
150	2029	2029
151	2030	2030
152	2031	2031
153	2032	2032
154	2033	2033
155	2034	2034
156	2035	2035
157	2036	2036
158	2037	2037
159	2038	2038
160	2039	2039
161	2040	2040
162	2041	2041
163	2042	2042
164	2043	2043
165	2044	2044
166	2045	2045
167	2046	2046
168	2047	2047
169	2048	2048
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344	2223	222

IN THE
Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 200

OTTO H. KRUGER,

Petitioner,

vs.

NED WHITEHEAD, doing business
under the fictitious name of WHITE-
HEAD & CO.,

Respondent.

**REFUTING LYONS' DARINGLY-UNTRUTHFUL
BRIEF ON MY PETITION FOR CERTIORARI
TO REVIEW.**

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Otto H. Kruger, begs this Court's indulgence on a few more statements, to nail the Lyons by their own words from their brief just filed, 3 copies received 9/6/1947.

TO OPPOSITION ON MOTION

The papers submitted with my motion will sufficiently refute all pretence of the Lyons as to what they know, and have, by way of service-notice attached to individual papers of record.

Besides, they make no effort at all, to name the items they pretend not to be able to identify, or of which they pretend not to have copies.

TO OPPOSITION ON PETITION

I beg pardon if this is a lengthy answer, only burdening the Court by Lyons' directly exposing their own untruth—

(untruth)—p. 3, lines 20/22:

“No petition for rehearing having been filed by petitioner during such thirty-day period”;—

self-contradicting last line, same page, and continuing p. 4:

“A ‘petition for rehearing’ had, however, been mailed on March 6, 1946, by petitioner”;—

which is very plainly two days before 30 days from Feb. 6, 1946.

Lyons' p. 4, lines 10/19, obviously resulting in mistakes between Courts; to make it one of the serious and pertinent grounds for this petition.

Lyons' p. 6, lines 7/16, adding more grounds—
(untruth)—lines 7/8:

“no conflict of decision” (1);—

to appear contrary to facts, when compared with pp.
13, 17 and other places of my petition.

(untruth)—lines 22/23:

“person or other object”;—

which can only be deemed extremely contra the very
plain and definite preamble of Ballou patent.

(45 of printed transcript).

(untruth)—p. 7, lines 5/8:

“The patent does not disclose any novel kind of
card . . . or construction . . . novel distin-
guishing matter . . . ”;—

similar untruth p. 13, lines 18/20;—all contrary to
facts, as set forth in my petition, pp. 15, 18, 19, 20, 21,
24, 29, 30 and other places; the Lyons, evidently, at-
tempting only further misleading without answering
real structure of my petition.

(untruth)—p. 7, last two paragraphs, regarding
claim 6. Quite apparently, they do not believe in their
own argument of claim 6, or they would not have to
stoop to so many other falsehoods, by which to attempt
to bolster up their collapsing position.

Nobody, not even the Lyons, could possibly deny
claim 1 to be the broadest claim in this case.

Then, how could it possibly be deemed the broadest claim to have become abandoned to the public by any discarding of the most-limited claim 6?

Particularly, when, at that very moment, claim 1 had been, and was, approved by the Appeal-Board.

Moreover, when any amending of claim 6 into allowable form, not only would have put more limitations into claim 6 but, would have duplicated already allowed features in previously allowed and remaining and issued other claims?!

In plain honesty, Ballou and/or Petitioner could not possibly be deemed to have admitted such Lyons-nonsense, neither directly, nor by inference.

The Appeal-Board's term "broad enough" should, quite unmistakably, more appropriately have been—

* vague, or indefinite *;

but positively—

. . . not broader than claim 1 . . .

Lyons' brief, p. 8, last three paragraphs, only emphasizes Courts' mistakes, of having deemed—

"Distr. Ct.: gist of the patent is the discovery of a solvent" (p. 13, my pet.);

"C. C. A. 9: correctly states, such solvents are well known" (p. 12 & p. 4, line 6 of my petition);

"Distr. Ct.: The problem, according to the defend-

ant was the finding of certain inks" (my pet., p. 17);

and, thereby, emphasizing—

... CONFLICT IN COURT OPINIONS ... ;—

on which the decisions must appear to be based,
lacking any other recorded interpretation.

Lyons' brief, p. 9, lines 9/21, can only be deemed
NEFARIOUS ABUSE OF COURT and expert.

It must be deemed that reciting Court's "understanding" as if with reference to the expert's statement of p. 95, lines 21/24, though with a lot of stars reprinted in Lyons' brief p. 9, lines 22/25;

any understanding should easily be extremely different if the connecting expert-statements had been given, here avoided by the Lyons, since the expert became more specific—

expert:—"vehicle would be affected, the carrier of the pigment" (95-25/26);

" "some of the pigments are resistant" (95-26);

" "leave the pigment on the surface" (95-last line);

" "might not be directly visible (96-12);

" "to the layman that wouldn't be so visible" (96-27);

" "wouldn't be perceptible to you" (97-28);—

to which the District Court, at last, gave up—

“Court: And the guard will not examine the ink with a magnifying glass, like you will, to see whether it has been altered, so it has to be something that is perceptible” (98-5/8);—

the expert having used his magnifying glass repeatedly right under the eyes of the Court over the top of the Bench, both trying to see things in samples passed back and forth between them, but even the expert, at times, could not see any affecting at points questioned by Court. (See page 97 of printed transcript, lines 6/14).

No honest person could possibly expect any expert to qualify and elucidate every answer; particularly, when Court showed inclination to interrupt and cut off, though the expert qualified his answer often enough, as in cross-examination by Lyons:

“Q. But any ink that was used up to today would bleed or run?

(expert)—“A. Not necessarily. I want to get this clear. I made a statement before, and I want to qualify the thing, if I may. You can absorb into the surface of the paper a sufficient degree of pigment so that the pigment remains after the vehicle has been washed out” (104-24/30);—

or, in another place—

“Q. It is true, isn't it, that any ink manufactured will be defaced, so that tampering with it would seem, when acetone or ketone are applied?”

(expert)—“A. No. You can make a non-soluble carbon, that will bond itself into the fibre of the paper and pigment. If I could elucidate a little bit, you might be able to wash this acetate off, and you would still have the residue of ink on there that might not have been badly defaced” (105-18/26).

The expert had also made his position clear previously about the bonding and SPLITTING—

(expert)—“should also bond to the acetate coating to such an extent that when the coating is split apart it would split the sheet” (93-4/6).

In the printed transcript, beginning with the last two paragraphs of page 107, all through page 108, and up to when the Lyons desperately, or horrifiedly, cried—

“That is all” (109-25);—

it was established that there were many so-called stable inks, of which the expert recalled and named a great number, after a chance to think; such stable inks to act like the carbon-black named previously, different from any bleeding-inks; which only emphasizes so much more that the Court-decisions were based on—
CONFLICTS—

“C. C. A. 9: all inks are soluble and bleed”
(my pet., p. 4, lines 22/23).

Referring to "problem"-understanding of the Trial-Court; the Lyons are rather foolish to use it, in their page 9, line 10, since it only emphasizes invention in Ballou's patent, which had been filed and issued several years before there was any war, the Court having previously acknowledged—

"Court: As I understand, this witness didn't work out the formula" (93-end).

It must be recalled, moreover, that the expert distinctly and definitely, not only did not have anything to do with any sort of working out any problem on identification-cards; but plainly testified that he knew nothing or very little about the Ballou-patent—

(expert)—"The only thing I know about it, I just briefly glanced at some of those things in the attorney's office yesterday afternoon" (109-27/29);—

" "I didn't make any study of it" (109-29);

" "I know very little about what is involved here" (110-2/3);—

and it was the same with other matters, when the Lyons attempted to drag in their humbug page 733 on plastics—

(expert)—"In the first place, I am not a specialist on plastics, and I would be very foolish to take issue with national authorities" (106-16/18);

and a similar thing when the Lyons tried to drag in paper—

(expert)—“I wouldn’t want to go into that, because I am not sufficiently familiar with the fibre structure of paper” (101-8/10).

The expert was introduced by my side only, to establish the known art of coloring, to which class ink may also be included, and for no other purpose.

It was the opposition, who attempted to confuse the issue with their ink, solvent, paper, plastics and even formulas for plastics, and ingredients, all of which had nothing to do with the true issue, which was in the structure, as set forth in my petition, such as “compound” pp. 15, 18, 19, 20, 21, 24, 29, 30 and other places.

Pages 10 to 15 of the Lyons’ brief is only a most hysteric attempt to confuse the issue similarly as explained above.

They have even the shamelessness, or is it brazenness? — avoiding answering serious charges made against their integrity, for investigation in the interest of the Public and professional standards.

They tell us long stories that the use of a thing is not patentable but—the structure; but they make no effort to answer reference to structure, set forth in so many places of the petition here named.

On the other hand, they attempt to prove their point of anticipation in Walsh-Caprio and Goodsell-Maynard by the mere use of solvent, disregarding that neither of those patents have any structure that could possibly be made into any sort of anticipating structure by any stretch of imagination.

They have made no effort to prove in any way or manner that the cement of Walsh ever would allow any solvent to get through to their color-scheme for any bleeding, the thing having been described as bleed-preventing, regardless of not having any structure for any sort of identification.

Walsh-Caprio would not think of any forger wanting to destroy a piece of art. (It would not sell).

Lyons dug themselves in so deeply, to, eventually evidently, feel to have to keep on digging; not big enough to say, to have made mistakes, if they wanted to call it that which it evidently is not.

CONCLUSION

Believing that Lyons' evident-untruth makes their whole brief worthless, and, further answering on my part, only an undue burden on this Court;—

I respectfully submit that the previous judgments may be found to be based on similar misleading by such untrustworthy-counsel Lyon & Lyon, and that the Ballou-patent may be found to be valid and infringed, granting me costs and damages besides injunction and accounting against the fictitious Whitehead & Co. including Lyon & Lyon, who never made any effort to prove to have had any cause for suit, only using that fictitious set-up to draw big War-income out of profits that should honestly belong to others, who had offered the free use of the Ballou-patent to our Government for the protection of our Servicemen and our People, as set forth in my exhibits in my pre-trial brief—Y-1-2-3-4-5. T and V-1-2 may also be interesting as to giving information all over the United States, all Vehicle License Offices, etc.; also Kirk Mfg. Co., October, 1935.

Respectfully submitted,

OTTO H. KRUGER

Otto H. Kruger, Petitioner.

1803 Virginia Road,
San Marino 9, Calif.,
September 12, 1947.

STATE OF CALIFORNIA,
County of Los Angeles.—SS.

Otto H. Kruger, being first duly sworn, deposes and says, that he is the petitioner named in the foregoing "Refuting Lyons' daringly-untruthful Brief"; that he has read and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

OTTO H. KRUGER

Otto H. Kruger.

Subscribed and sworn to before me
this 12th day of September 1947.

JESSIE M. WILLIAMS
Notary Public in and for the County (SEAL)
of Los Angeles, State of California.

My commission expires October 18, 1950.